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IN THE

Supreme Court of the United States

HARTFORD ACCIDENT & INDEMNITY COMPANY,
Appellant,

v.

O. L. BUNN, doing business as
BUNN ELECTRIC COMPANY, et al.,
Appellees

No. 333

OCTOBER TERM, 1931

MOTION FOR REHEARING

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No. 333

OCTOBER TERM, 1931

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION FOR A REHEARING

Comes now the appellant, Hartford Accident & Indemnity Company, and moves the Court to grant a rehearing as to the opinion, orders and judgment rendered in this case on March 14, 1932, and to set the same aside and to restore the case to the docket of the Court for determination on its merits on the grounds hereinafter stated.

EXPLANATORY FOREWORD

It is inexcusable for counsel to burden the Court with a motion for a rehearing except where the situation is distinctly out of the ordinary. Our excuse for burdening the Court now with such a motion is that we know the Court regards it as unfortunate for a case asserting constitutional rights of general importance as well as of importance to the appellant to be disposed of on a point of procedure without consideration of a substantial constitutional claim.

Such an unfortunate termination has resulted in this particular case. If this result is inevitable, or if it comes about because counsel has disregarded the established appellate procedure of the Court there would be nothing further to be said; but it is the object of this motion to show that such is not the case.

We believe we can demonstrate that the dismissal is not inevitable; and that the procedure followed by counsel which has resulted in the dismissal does not show a disregard of the established appellate practice of the Court, but on the contrary is in exact accordance with specific and direct precedents in the decisions of this Court which have not been noted in the opinion dismissing this case—precedents which have not been questioned in forty years in this Court (at least so far as its published opinions show) and have been treated by the various Circuit Courts of Appeal as definitely establishing a federal appellate practice in accord with that followed by the appellant in this case.

It is, of course, possible that after further consideration the Court will believe that we are mistaken in the foregoing

statements. They are, however, made after deliberate consideration and after exhaustive investigation, in which we have endeavored to keep constantly in mind the obligation of counsel the Court as well as to the client. Hence we respectfully ask a consideration of the precedents from this Court on which the statements are based.

GROUND 1—That the Court has in this case declared and applied a new rule of appellate procedure, abolishing a method of procedure hitherto recognized by the decisions of this Court, without prior notice of an intention to do so; or else has by inadvertence overlooked the fact that the dismissal of the appeal in this case is contrary to well considered precedents in this Court, to which the Court has made no reference in the opinion.

What we mean is this: We recognize the right of this Court to announce a new rule of decision on questions of practice and to do so without formally overruling prior precedents to the contrary. But we do most respectfully insist that, out of fairness to the parties and their counsel, in the interests of justice and in accordance with the usage of this Court, this should not be done without notice or warning. We refer to the custom adopted in such cases as *Norfolk Turnpike Co. v. Virginia*, 225 U. S. 264 (cited in the opinion in this case), where the Court did not dismiss the appeal then pending before it, but announced that after a certain time in the future a contrary rule would apply.

It is our insistence that the practice, now so universally recognized in state courts and in lower Federal appellate

tribunals, that failure to join in subsequent appeal a surety on appeal bonds and on other similar bonds merely given as security for the enforcement of the judgment is not a fatal defect, ought not to be condemned without notice, especially since the rule of practice, dispensing with the joinder in such cases, is based on direct, unequivocal, hitherto unchallenged precedents in this Court.

The rule and precedent in this Court, that from a judgment or decree, though joint on its face, against a party to the cause and his surety on appeal or from any judgment or decree, which though joint in form is severable in law or in fact, a party may appeal (or formerly take writ of error) on his severable interest, without joinder of others included in the same judgment or decree, and without summons and severance, or equivalent proceeding, is established in the following (and perhaps other) cases, which are not noticed in the opinion and which are in effect overruled by it.

Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572, 34 L. ed. 539;

Hanrick v. Patrick, 119 U. S. 156, 30 L. ed. 396;

City National Bank v. Hunter, 129 U. S. 557, 579; 32 L. ed. 752.

Winters v. U. S., 207 U. S. 564, 52 L. ed. 340;

Forgay v. Conrad, 6 How. 201, 12 L. ed. 404;

Basket v. Hassell, 107 U. S. 602; 27 L. ed. 500;

Marsh v. Nichols, 120 U. S. 595; 30 L. ed. 794; 30 L. ed. 793;

O'Dowd v. Russell, 81 U. S. 402; 20 L. ed. 857;

Amadeo v. Northern Assurance Co., 201 U. S. 201; 50 L. ed. 726;

Germain v. Mason, 79 U. S. 259; 20 L. ed. 392,

in which the Court said:

> "We have examined the record—a very confused one—but from it we gathered enough to satisfy us that the judgment of which Germain complains is such a separate judgment against him as authorizes him to ask a review of it here, without joining his co-defendant in the court below."

Todd v. Daniel, 16 Pet. 521; 10 L. ed. 1054.

Perhaps the most direct and perspicuous precedent not noticed in the opinion in this case—the precedent usually cited by courts, by text writers, by annotators and counsel as authority for the proposition that though a party and his surety on appeal bond are included, as an incident of local appellate practice, in an apparently joint judgment of the court from which the appeal lies, the party may appeal on the substantive questions of the case, without joining the surety, is the case of *Inland & Seaboard Coasting Co. v. Tolson*, 136 U. S. 572; 34 L. ed. 539.

The essential facts in that case and in the present case are identical. There, as here, the motion to dismiss was on the ground that a surety on intermediate appeal whom the court below had included in its final judgment along with his principal—a judgment joint in form—was not included as a party to the appeal by his principal from that judgment. The court,

on the first hearing of the motion, sustained it and dismissed. Later in the term, a rehearing was sought. Though the time for the allowance of the appeal had expired, a motion to make the omitted surety a party was made with the surety's consent and cooperation—just as has been done here. The rehearing was granted. The Court reversed its former action, and overruled the motion to dismiss. It also allowed the surety to be made a party.

(At the argument of the present case, some question was raised from the bench as to whether the time for the allowance of an appeal, or writ of error—at that time two years—had expired before the motion to amend and make the surety a party in the Tolson case had expired. An examination of the original record in the office of the Clerk of this Court, subsequently made, discloses that the final judgment appealed from in that case was rendered in July, 1887, and that the motion to amend was not made until December, 1889, more than two years later. As some difficulty was encountered in the clerk's office in locating the old record in the Tolson case, we call attention to the fact that it may be found filed under the later docket number given it when it was restored to the docket for argument, No. 229, October Term, 1890.)

Throughout the more than forty years which have elapsed since the Tolson case was decided, no case, so far as our search has disclosed, has ever been dismissed in this Court for failure to join the surety on appeal, though joined in joint judgment with his appealing principal; nor, so far as we can find, has the binding authority of the Tolson case ever been questioned. As shown in our original briefs on the question, it has become the basis for the established practice in the various U. S. Courts of Appeals.

GROUND 2—That the criticism in the opinion in this case of the ruling found in the opinion of Judge Lurton in *The New York*, 104 Fed. 561, 563 (U. S. C. A. 6th Circ.), that "though joint in form, the decree was separable in law and in fact and, therefore, the surety was not a necessary party,"—the criticism being that "considering former opinions of this Court and the long established practice, we cannot accept as applicable to appeals here the doctrine approved in *The New York*"—is not well founded; that the decisions of this Court are the basis for the rule announced in *The New York* that in considering a motion to dismiss for failure to join (or to summons and sever) a party included in the final judgment, the Court looks beyond the form of the judgment to see whether, though apparently joint in form, the judgment (or decree) was separable in law or in fact.

Judge Lurton, in *The New York*, borrowed the phrase "in law and in fact" and made the distinction out of the case of *Hanrick v. Patrick*, 119 U. S. 156, 163, 30 L. ed. 396. In that case, in overruling a motion to dismiss a writ of error on the ground of non-joinder, as a plaintiff in error, of one included in the apparently joint final judgment appealed from, this Court had said: "The judgment must be regarded as joint in form only, but severable in fact and in law." This Court pointed out that while the rule was especially applicable to decrees in equity, there was no reason why it should not be applied to judgments at law, when the circumstances require. Of course, it is in mind that the appeal in the present case is from a decree in equity.

Also, just prior to Judge Lurton's opinion in *The New York*, the Chief Justice, in this Court, in overruling a similar motion to dismiss in an equity case, had made the distinction that "the decree was severable in fact and in law." *City National Bank v. Hunter*, 129 U. S. 557, 579, 32 L. ed. 752, 760.

We respectfully submit that not only is the reasoning in the opinion in *The New York* sound and cogent, but that the decision is grounded in the precedents of this Court, and is consistent with the precedents of this Court, both before and after its rendition.

For example, in *Winters v. U. S.*, 207 U. S. 564, 52 L. ed. 340, though the decree was joint in form, the Court looked back through the record, and determined that the controversy was severable in fact, and refused to dismiss the appeal brought by one defendant, without joining the others.

(See also the cases cited under Ground 1 hereof.)

We cannot afford to make the direct statement, without verifying the facts more accurately than we have had opportunity of verifying them, that in the majority of the cases which have come to this Court in the last fifty years, from jurisdictions (including Federal courts, conforming to the State practice) in which it is customary to include a surety on appeal bond in the final judgment or decree, the surety on appeal has not been joined in the appeal or writ of error in this Court, with no notice taken of the fact, nor any adverse criticism made of the practice in this Court; though we have reason to believe that this is true.* But we do feel assurance,

*See list of cases in the footnote near the end of this motion.

in saying that so far as the published opinions of this Court disclose, no appeal or writ of error has ever been dismissed for failure to join as co-appellant a surety on appeal or for failure to join as co-appellant any other party to a judgment or decree, where the judgment or decree, though joint in form, was severable in law or in fact, and this fact was brought to the attention of the Court.

In making this statement, we do not overlook *Estes v. Trabue*, 128 U. S. 225; 32 L. ed. 437, or *Mason v. United States*, 136 U. S. 581. In those cases there was no question but that the judgments appealed from were joint in law and in fact. They have frequently been distinguished on that ground by the various U. S. Courts of Appeals in the cases cited in our original briefs. The sureties in those cases were not sureties on appeal, but were parties defendant from the beginning of the case, with right to defend, to assign error and appeal. At the time *Estes v. Trabue*, which came from Mississippi, was decided, under the statutes of Mississippi and the decisions of the Supreme Court of the State, the judgment in such cases was joint; and under the then local practice the sureties were necessary parties to an appeal under the state law. In *Mason v. United States*, the surety attempted to appeal without joining the principal.

There was nothing in the record in the case of Estes on which the Court could have predicated a severability; but in the Tolson case, rendered about two years later, when the severability of the issues was called to the attention of the Court, it refused to follow the Estes case as being applicable.

As to the other cases cited in the opinion in this case:

In *Davis v. Mercantile Trust Company*, 152 U. S. 590, 38 L. ed. 563, the dismissal was for failure to join parties adversely interested as appellees—not for failure to join a party as a co-appellant.

In *Garcia v. Vela*, 216 U. S. 598, 54 L. ed. 632, there was no question but that the party not joined as co-appellant was jointly interested both in the judgment and in the controversy and also in the question the appealing party sought to raise.

This motion for rehearing assumes the correctness of the general rule quoted from *Hardee v. Wilson*, 146 U .S. 179, 180, 36 L. ed. 933, that "undoubtedly the *general rule* is that all the parties defendant, where the decree is a joint one, must join in the appeal." The very statement of the rule, however, implies exceptions. The Court in that case determined the joint nature of the judgment from an inspection of the entire record and the nature of the questions presented. The Court also points out that the notion of summons and severance grew out of cases where two or more parties had a joint interest in a cause of action or in a substantial right. There is nothing in that case which in the slightest indicates a departure from the rule announced in those decisions of this Court, that though a judgment or decree be apparently joint, a separate right of appeal exists, if the judgment or decree be severable in law or in fact.

GROUND 3—That the Court, in stating in the opinion that the surety in this case might have appealed, has overlooked the fact that, under the decisions of this Court, if the surety on the appeal bond, in this case, had undertaken to appeal, either

alone, with or without summons and severance, or jointly with its principal, it would have been the duty of the Court to have dismissed the appeal, as to the surety, upon its coming to the attention of the Court that the surety had not raised in the court below—and could not have raised—any of the constitutional questions on which the jurisdiction of the Court in this case depends.

Sully v. American National Bank, 178 U. S. 289, 297; 44 L. ed. 1072, 1075.

Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 25; 68 L. ed. 541, 545.

Davis v. Preston, 280 U. S. 406; 74 L. ed. 514.

Smith v. Indiana, 191 U. S. 138; 48 L. ed. 125.

We assume that any party which would be dismissed from the appeal, if joined therein, is not a necessary party to the appeal, even from the most formal standpoint.

GROUND 4—That the Court has overlooked the fact that, under the established precedents of this Court, if a judgment be both joint and several, any person adversely affected may have his separate appeal.

It is only where lack of severability exists that the rule exists requiring the joinder in appeal of others joined in the judgment. We recognize that often, when it has not been necessary to make this distinction, the rule has been stated in the form that one included in a joint judgment cannot appeal

alone without summons and severance or like proceedings; but from the earliest days this Court has recognized the true meaning of the rule to be as first stated above.

An examination of the facts in *Cox and Dick v. United States*, 6 Pet. 172; 8 L. ed. 359, will show an application of this principle; and this is clarified by the statement in *Todd v. Daniel*, 16 Pet. 521; 10 L. ed. 1054, that "In the case of Cox and Dick v. The United States, no doubt was entertained by this Court that a writ of error might be entertained by the defendants severally where the judgment operated under the laws of Louisiana as a several as well as a joint judgment, although they might have united in the writ of error." (Note that this is also authority for the proposition that for purposes of appeal the laws of the State, where rendered, are controlling as to whether a judgment is joint only or is also joint and several.)

GROUND 5—That the Court overlooked the fact that the final decree of the Supreme Court of Mississippi in this record is in form not a joint judgment only; but is on its face a several judgment against appellant and its surety on appeal—that in fact it consists (R. 75) of three parts: (1) a judgment reversing the decree of the Chancery Court as to one party and dismissing the action as to that party; (2) a judgment affirming (with the exception stated) the decree of the Chancellor—a decree to which the surety on appeal was in no wise a party; (3) an administrative judgment, providing for the enforcement of its decree against the present appellant by condemning the security it had offered

on appeal (i. e., its appeal bond) by rendering a judgment against the appellant and its surety on that bond.

The situation is not different from what it would be if a court of equity had a bill before it to foreclose a mortgage. It would first render a decree foreclosing the mortgage and fixing the mortgage debt; and then, as an administrative matter, provide for the sale of the mortgaged property.

Just as the decree of foreclosure is final and supports appeal on the merits of the controversy by the main defendant alone, despite the fact that the court's action may be interlocutory only so far as relates to the provisions of the decree concerning the methods by which the Court proposes to enforce its decree (See *Forgay v. Conrad*, 6 How. 201; 12 L. ed. 404; *Carondelet Canal Co. v. Louisiana*, 233 U. S. 362; 58 L. Ed. 1001) just so the decree in this record was final and such as to support an appeal, the moment the Supreme Court of Mississippi affirmed the decree of the Chancery Court against this appellant; nor, it seems to us, is the right of this appellant to appeal from that decree and to appeal without joining any one else, affected by what the Court may have later done, though in the same document, by way of administrative provisions designed to make effective what it had already adjudged against the present appellant alone, it entered another and further joint judgment.

That the liability on the cause of action and the liability on the bond given to secure the final judgment are so separate as to give a valid basis for separate appeals if necessary. See *Ex parte Sawyer*, 21 Wall. 235; 22 L. ed. 617.

We have in another division of this motion distinguished *Estes v. Trabue*, 128 U. S. 225; 32 L. ed. 437, on other grounds; but one feature of it is especially pertinent to the ground now under discussion; for in that case the Court points out that the judgment then under review could not be regarded "as containing a separate judgment against the claimants, and another separate judgment against the sureties," thus implying that the rule there announced would not apply if the judgment were in two or more parts.

Also if the Court applies its judicial cognizance of the laws of Mississippi to this judgment (see next ground of this brief) it knows that as to the surety on the appeal bond the liability established in the final judgment is contingent only (See *Wilson v. City of Lexington*, 153 Miss. 209; 119 So. 795) and this case is thereby distinguished from Estes v. Trabue, wherein one of the grounds of holding the surety on the bond then sued on to be a necessary part to the appeal by the principal was that there was nothing whereupon the surety's liability in that case could be regarded as contingent.

GROUND 6—That since the Court may, by exercising its undoubted power to take judicial cognizance of the laws of Mississippi, know that the judgment before it is a severable as well as a joint judgment, irrespective of its form, it is the duty of the Court to exercise that power and to retain jurisdiction of the case.

More immediate to this point than even the holding in *Central Loan & Trust Co. v. Campbell Commission Co.*, 173 U. S. 84, 90; 43 L. ed. 623, 625, that the effect of state

court judgments is a matter of state law, and the statement in *Kenney v. Craven*, 215 U. S. 125; 130; 54 L. ed. 122, that "the scope and effect of a state judgment is peculiarly a question of state law," is the ruling in *Todd v. Daniel*, 16 Pet. 521; 10 L. ed. 1054, that if under the state law a judgment is several as well as joint, any defendant may prosecute his separate appeal to this Court.

Under the laws of Mississippi, the final judgment in this case is several as well as joint. (It was conceded at the argument, that such is the law of Mississippi, but it can be easily verified by the authorities.)

Mississippi Code, 1930, §§2027, 2028.

J. B. White's Garage v. Boyd, 149 Miss. 383; 115 So. 334;

National Surety Co. v. Austin Machinery Co., 35 F. (2) 842, 845.

National Surety Co. v. LaFlore County, 262 Fed. 325.

To ask the Court to apply its judicial cognizance to this judgment is not to ask the Court to "explore the record to ascertain what issues were relied upon in the court below." To know whether any judgment is a joint judgment, even in the matter of form, requires the exercise of the Court's cognizance of the law.

However, we respectfully insist that, as shown by the cases cited in connection with other grounds hereof, this Court has not hitherto refused to go into the record to determine whether

there is severability in a judgment apparently joint on its face.

Nor do we see how, in many cases, the Court could exercise its undoubted jurisdiction without looking beyond the face of the judgment to tell whether the judgment is joint or several, or even to tell who the parties to it are. For example, a trial court sustains demurrer to a petition or a complaint and dismisses it. The Supreme Court of the State affirms the judgment and its judgment is in the form commonly used in appellate courts, that is to say, the judgment is entitled in the short form commonly employed in docketing, followed by a recitation of consideration of the appeal and a simple ordering that "the judgment of the court below be affirmed." This Court in such cases must look to the pleadings, at least, to construe the judgment. In fact, the rule is uniform that judgments must be construed in connection with the record—a rule the wholesomeness of which has never been questioned.

GROUND 7—That a substantial difference exists between allowing an appeal after time for appeal has expired and allowing an amendment perfecting an appeal allowed in time, but defective in some technical point.

The Tolson case, supra, is direct, unequivocal, exact authority for the point that an amendment may be allowed in this Court joining the surety on appeal where the principal has appealed in time but the amendment is not offered till time for appeal has expired.

The reconciliation, it seems to us, between the Tolson case and other cases, such as *Rust Land Co. v. Jackson*, 250 U. S. 71, and *Toledo Co. v. Computing Scale Co.*, 261 U. S. 399, is that no matter in what form the application comes, if it be truly and in substance an effort to appeal without anything having been done within the prescribed time which can be considered as an attempt to allow an appeal, the application must be denied; but that if the application be merely to perfect in some formal point an appeal which has been allowed in time, it may be granted, despite the lapse of the statutory period.

If the application comes in the form of a motion to amend, we assume that the rule applicable generally to amendments applies, namely, that if the amendment attempts to introduce a new cause of action or a new right (or as applied to appeal it is more accurate to say, a new ground or basis of appeal) it does not relate back to the beginning of the proceedings; but if it merely cures some defect or delinquency, especially if the defect be of form rather than of substance, it does relate back.

If the surety on appeal be a necessary or proper party to an appeal to this Court, in a case such as this, where the constitutional questions which constitute the sole basis on which the jurisdiction of this Court is, or can be invoked, relate solely to the party which has been allowed a timely appeal, an amendment to make the surety a party to the appeal is not an amendment introducing a new right nor a new basis of appeal, nor which in any otherwise changes the appeal in substance, but is merely an amendment to perfect the appeal in a matter of form.

The principle is well established that if, in the time prescribed, any order or action is taken by the court or judge having power to allow an appeal (or, of old, a writ of error) which indicates a bona fide effort to comply with the statutes and rules on appellate procedure, the jurisdiction of this Court attaches, and from that time on this Court has the power to allow delinquencies and omissions to be cured; and the history of this Court is that as to such matters it has been highly non-technical.

Beaumont v. Prieto, 249 U. S. 554; 63 L. ed. 770;

Southern Pine L. Co. v. Ward, 208 U. S. 126; 52 L. ed. 420.

The Act of Congress (U. S. Code Title 28, § 873, R. S. § 1005) is construed in *Bondurant v. Watson*, 103 U. S. 278; 26 L. ed. 447, as conferring jurisdiction on this Court to perfect the appellate procedure by amendment whenever a writ of error "has been colorably issued."

For a full review of the statutory authority of this Court under the statute, see *Walton v. Marietta Chair Co.*, 157 U. S. 342; 39 L. ed. 725.

See also *Texas & Pac. Ry. Co. v. Kirk*, 111 U. S. 486; 28 L. ed. 481.

GENERALLY

The opinion in the present case refers to possibilities of confusion, as a basis for condemning the appellate procedure taken in the case. May we not call to the attention of the

Court the confusion and the difficulties which would confront the parties and their counsel and probably the Court, when, in a case such as this, they undertook to join the surety on the appeal bond with the party to the controversy, the invasion of whose constitutional rights constitutes the basis of the appeal? In appeals of this kind, the assignments of the error—the specification of the constitutional right of the appealing party which is claimed to have been invaded—the allegations to show that the excepting party stands in such relation to the alleged violation of the Constitution as that he is entitled to challenge the validity of the law, judgment or whatever it be that is challenged—are the very gist of the appeal. Shall the surety, none of whose constitutional rights have been invaded, assign error on constitutional points with which he has no legal concern? Would joint assignment of error by two parties be good where one of them has the right to make the constitutional question and the other has not? Would not the burdens of the Court be added to because cautious counsel, by reason of these doubts, would either file duplicate assignments of error to present the questions severally as well as jointly; and in some cases take two or more appeals, on the theory that if one failed the other would be held good? It is within the knowledge of the Court that following the warning of the Court in *Norfolk Turnpike Co. v. Virginia*, the Court was thereafter burdened with two writs of error—one good and one bad—in cases where counsel were in doubt.

May we not respectfully suggest that if the Court thinks it wisest and best to depart from the precedent of the Tolson case, or to lay down any new rule on the subject, it is in the interests of justice that this should be done by the adoption

of an amendment to the rules of the Court, to take effect after a reasonable time in the future, rather than by the dismissal of the present appeal, in which counsel have followed the practice which the Tolson case certainly sanctions, and which, since the Tolson case, the other Federal appellate tribunals have so fully sanctioned?

We are far from asserting that the effect on the self-esteem or professional pride of counsel should influence the judgment of this Court, and yet the opinions of this Court throughout its history show that where counsel have made an honest effort to comply with the rules of the Court, the Court has been reluctant, especially in doubtful cases, to render an opinion so phrased as to reflect on their professional skill.

If counsel in this case have been guilty of a delinquency in procedure, it is merely because they have been misled by the precedents of this Court—precedents which have also misled the judges of the United States Courts of Appeals in several circuits. In preparing the appeal, counsel, out of deference to the Court and out of a desire to lighten its labors, took great pains to isolate the sole constitutional point on which the appeal rests from a voluminous mass of record and questions in the court below and to simplify the appeal in every other permissible respect. If counsel erred, it was not through negligence, or lack of study of the authorities, but through lack of skill and ability to understand them.

And yet the present opinion leaves them under the embarrassment of having written down permanently against them in the reports of this Court a decision which, to the casual reader at least, carries the impression that they ha.

failed to observe in their practice a plain, unbroken line of precedents.

Therefore, are we not justified in asking that, if it be the intention of the Court to abrogate the practice permitted under the precedents on which we have relied, that the abrogation be not applied in the present case; even though this case be used as an opportunity to notify the bar that the practice will not be recognized in the future?

Therefore, we pray that the Court do revoke and set aside its judgment, dismissing the appeal in this case, and, if it be deemed necessary or appropriate that the Aetna Casualty & Surety Company be joined in the appeal, that the order or judgment refusing the motions to that end be vacated and set aside; that the motion to dismiss be overruled and denied; and that the Court do restore the case for determination on its merits.

As to Appellees' Motion to Reopen the Judgment, and to Assess Damages:

While the appellant's motion for a rehearing was in course of being printed, opposing counsel served copy of a motion by appellees for a reopening of the judgment of dismissal for the purpose of including an award of damages under Rule 28 (3). We, of course, resist the reopening for that purpose.

The rule allowing damages where the appeal is "merely for delay" is quite salutary; but it has never been used, and, of course, should never be used to deter litigants from appealing to this Court for the protection of their constitutional

rights which they in good faith believe to have been invaded.*

Certainly no solvent surety company, as a party having another solvent surety company bound, as surety, for the

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*Able opposing counsel is hardly in a position to charge that the question of the effect of non-joinder of the surety on appeal is so well settled as that the omission to join is evidence of bad faith and of appeal for mere delay, since in the case of *Magnolia State B. & L. Assn. v. Miller*, 282 U. S. 803; 75 L. ed. 722, in which there was a judgment in the Supreme Court of Mississippi in substantially the same form as here involved (i. e., first a judgment affirming the judgment of the trial court, followed by a judgment apparently joint against the appellant and the surety on the appeal bond for a given sum of money, plus interest, damages and costs), he was counsel for the appellant and did not join the surety on appeal, when he appealed to this Court. The case was dismissed for lack of substantial federal question and not on the question of non-joinder.

Counsel for the present appellees were likewise counsel for the plaintiff in error in *Hattiesburg Grocery Company, v. Robertson,* 260 U. S. 710, 67 L. ed. 475, and did not make his surety on appeal a party to the writ of error. The writ of error was dismissed on other grounds.

In the case of *Millsaps College v. Jackson,* 275 U. S. 129; 72 L. ed. 196, the judgment of the Supreme Court of Mississippi followed the usual form (i. e., first a judgment of affirmance and then a judgment, apparently joint, against the appellant and his surety on supersedeas bond for the costs in both courts, there being no other monied liability involved). Counsel for the appellees in the present case was counsel for the defendant in error in that case. We are informed by the Clerk of this Court that while the record shows no motion to dismiss, counsel for defendant in error devoted three pages of his brief in this Court to the argument that this Court was without jurisdiction because the surety on appeal was not joined in the

judgment with a third solvent surety company on its supersedeas bond in this Court, is going to seek to delay the payment of a judgment which is bearing interest on the amount

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writ of error. This argument was ignored by the Court, for in the opinion by Mr. Justice McReynolds there is no reference to it, and the case was decided on its merits.

We have made an attempt to check from the records in the office of the Clerk of the Supreme Court of Mississippi the history of the cases decided by that court which have been brought to this Court in the last ten years. The check we have undertaken to make is incomplete and subject to possible error because of a loss of a considerable portion of the records, but our investigation indicates that in all these cases the judgment in the Supreme Court of Mississippi was in the form commonly employed by that court in affirming a lower court, including the apparently joint judgment against the appellant and his security on appeal; (of course if there was a judgment of reversal, there would be no judgment against the surety on the appeal bond) and that (with the exception of one case) in the appeal or writ of error or application for certiorari to this Court, the surety on appeal was never joined in the appellate proceedings to bring the case to this Court; and that in none of these cases has this Court declined jurisdiction on the ground of the non-joinder of the surety on appeal.

Reference is had to the following cases in addition to those mentioned above (a list which is, however, not exhaustive):

Memphis & C. R. Co. v. Pace, 282 U. S. 241; 75 L. ed. 315.
Superior Oil Co. v. Mississippi, 280 U. S. 390; 74 L. ed. 861.
C. & G. R. Co. v. Miller, 283 U. S. 96; 75 L. ed. 861.
G. M. & N. R. Co. v. Touchstone, 276 U. S. 592; 72 L. ed. 721.
Swayne v. Hattiesburg, 276 U. S. 599; 72 L. ed. 724.
A. & V. R. Co. v. J. & E. R. Co., 271 U. S. 244; 70 L. ed. 928.
L. & N. R. Co. v. Garfield, 264 U. S. 576; 68 L. ed. 857.
Davis v. Green, 260 U. S. 349; 67 L. ed. 299.
First Nat. Bank v. Adams, 258 U. S. 362; 66 L. ed. 661.

at the rate of 6% per annum, by incurring the expense of an appeal to this Court, unless very strongly advised that the appeal is meritorious. If the appeal be unsuccessful the appellees lose nothing. They are getting 6% interest on their principal, their interest, their damages and their attorneys' fees and costs allowed them in the court below. On the other hand, unless the appeal succeeds, the appellant has lost heavily by the delay, not only in costs and expenses, but in added interest; for no insurance or surety company can earn 6% on its investments from which it must pay losses.

To charge counsel with bringing an appeal to this Court for mere delay is a reflection on their professional probity, but to charge it in this case, in the circumstances stated, is also a reflection on their intelligence and the intelligence of their client.

Certainly there was nothing in the attitude of the Court, at the oral argument of the case, to give opposing counsel any confidence in their point, that the constitutional question on which the appeal is based was considered as frivolous by the Justices who sat at the hearing.

In fact, there is much to support the suspicion that counsel for the appellees are serving their motion merely to deter the appellant from pursuing its right to bring its motion for rehearing to the attention of the Court, lest it be granted and the case be decided on its merits.

Our confidence in our motion and in the merits of our case if the motion be granted and our confidence in the Court are

such as to make us feel that it is our duty to ourselves, to our client and to the Court itself to present and urge our motion for a rehearing.

Respectfully submitted,

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Arthur G. Powell .....
Of Counsel

I certify that the foregoing motion is presented in good faith and not for delay.

Arthur G. Powell .....
Counsel for Appellant